Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-4475-00
JAMoon

date: AUG 16 2000

to: Chief, Examination Division, Southern California District
Attention: Lorna Fenton, CEP Case Manager
Gerald M. Molina, CEP Team Coordinator
Santa Ana CE 1103

from: Southern California District Counsel, Laguna Niguel
June Y. Bass, Assistant District Counsel
Jenny A. Moon, Attorney

subject: **Advisory Opinion re Statute Extension**
Taxpayer: [redacted] **(EIN:** [redacted] **)** [redacted]
Tax Years Ended [redacted], [redacted], [redacted], [redacted], [redacted]
Current Statute of Limitations: [redacted] **(for** [redacted]
through [redacted]**, inclusive, and** [redacted] **(for** [redacted]**)**

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THIS ADVICE IS NOT BINDING ON EXAMINATION OR APPEALS AND IS NOT A FINAL CASE DETERMINATION. SUCH ADVICE IS ADVISORY AND DOES NOT RESOLVE SERVICE POSITION ON AN ISSUE OR PROVIDE THE BASIS FOR CLOSING A CASE. THE DETERMINATION OF THE SERVICE IN THE CASE IS TO BE MADE THROUGH THE EXERCISE OF THE INDEPENDENT JUDGMENT OF THE OFFICE WITH JURISDICTION OVER THE CASE.

This memorandum is pursuant to your oral request for our advice in determining the proper party to execute a Form 872, Consent to Extend the Time to Assess Tax, for the consolidated returns of [redacted] (the "Taxpayer") for tax years ended [redacted], through [redacted], inclusive, and for short tax year ended [redacted] (the

"tax years at issue").

FACTS[1]

The Taxpayer is a consolidated group of corporations, the common parent of which during the tax years at issue was [redacted] ("[redacted]"), a Delaware corporation.

On [redacted], [redacted] ("old-[redacted]") merged into [redacted], a wholly owned subsidiary of [redacted], and immediately changed its name to [redacted] ("new-[redacted]").

During [redacted], [redacted] ("old-[redacted]") formed three corporations: [redacted] ("[redacted]"); [redacted], a wholly owned subsidiary of [redacted]; and [redacted], also a wholly owned subsidiary of [redacted].

On [redacted], [redacted] was merged into old-[redacted], while [redacted] was merged into [redacted] such that old-[redacted] and [redacted] became wholly owned subsidiaries of [redacted]. In addition, the shareholders of old-[redacted] and [redacted] became shareholders of [redacted], and [redacted] acted as a holding company for old-[redacted] and [redacted].

On or before [redacted], [redacted] changed its name to [redacted] ("new-[redacted]") and old-[redacted] changed its name to [redacted].

On [redacted], [redacted][2], an Indiana corporation and a wholly owned subsidiary of new-[redacted], changed its name to [redacted] ("[redacted]").

On [redacted], new-[redacted] merged into [redacted].

Effective [redacted], [redacted] was merged downstream into [redacted], and [redacted] became a wholly-owned first tier holding company

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[1] We have not undertaken any independent investigation of the facts of this case. If the facts stated herein are incorrect or incomplete in any material respect, you should not rely on the opinions set forth in this memorandum, and should contact our office immediately.

[2] According to Lexis, see Exhibit J, it appears that [redacted] was formerly known as [redacted].

of new-[redacted]; the following are noteworthy provisions from the Plan of Merger involving [redacted] and [redacted]:

Clause 2.1 of Article II, entitled "The Merger" states, "The Merger will occur in accordance with the laws of the State of Indiana."

Clause 2.2 of Article II, entitled "Effect of the Merger; Assumption of Obligations," states:

> Upon completion of the Merger, the Surviving Corporation [redacted] shall possess any and all rights, privileges, franchises, immunities, and licenses of the Merging Corporation [redacted]. All property, whether real, personal, or mixed, tangible or intangible, and all debts due on whatever account belong to, or due and owing to the Merging Corporation, shall be transferred to and vested in the Surviving Corporation without further act or deed to the fullest extent provided by Indiana law. The Surviving Corporation shall assume and be responsible and liable for all liabilities and obligations of the Merging Corporation as required by Indiana law.

Clause 4.1 of Article IV, entitled "Conversion of Merging Corporation Shares for Surviving Corporation Shares," states:

> As of the Effective Date, each outstanding share of the Merging Corporation shall be cancelled and a total of [redacted] shares ([redacted]) of the Surviving Corporation shall be issued in exchange therefor. Therefore, upon the close of the Merger, without any other action required, the Surviving Corporation shall issue [redacted] ([redacted]) of the Surviving Corporation's common shares to [redacted]. As a result, [redacted] will own [redacted] percent ([redacted]%) of the issued and outstanding shares of the Surviving Corporation's capital stock following the Merger. No other consideration shall be given for the shares of Merging Corporation held by [redacted] immediately prior to the Merger.

Clause 4.2 of Article IV, entitled "Share Certificates,"

states:

> As of the Effective Date, all share certificates of the Surviving Corporation issued to [redacted] shall be canceled. As of the Effective Date, all share certificates of the Merging Corporation issued to [redacted] shall be deemed to represent ownership of the Surviving Corporation's issued and outstanding shares until such time when such share certificates are exchanged for shares of certificates representing the appropriate number of common shares of the Surviving Corporation issued as provided above.

Also effective [redacted], [redacted] was merged into [redacted].

According to Exam, neither [redacted] nor the members of the [redacted] group has filed with the Service a designation of another member to act as agent.

Statements filed with the [redacted] return of the new-[redacted] and relevant portions of the Agreement and Plan of Reorganization among old-[redacted], [redacted], [redacted], [redacted], and [redacted] are attached hereto as Exhibit A.

Relevant portions of the Articles of Merger and Plan of Merger between [redacted] and [redacted] are attached hereto as Exhibit B.

Relevant portions of the Articles of Merger and Plan of Merger between [redacted] and [redacted] are attached hereto as Exhibit C.

Relevant portions of the Form 1120, Form 7004, and Form 851 filed by the Taxpayer for tax years ended [redacted], through [redacted], inclusive, are attached hereto as Exhibits D, E, F, and G, respectively.

Relevant portions of the Form 1120, Form 7004, and Form 851 filed by the Taxpayer for short tax year ended [redacted], are attached hereto as Exhibit H.

Organizational charts for the years [redacted] to [redacted] are attached hereto as Exhibit I.

Relevant portions of the Delaware and Indiana corporate/business law, and filings with the secretary of state,

all retrieved from a Lexis-Nexis search, are attached hereto as Exhibit J.

DISCUSSION

In general, the common parent corporation and each subsidiary which was a member of the group during any part of the consolidated return year is severally liable for the tax of the group for such year (i.e., is responsible for the tax of the entire group, not simply its proportionate share). Treas. Reg. § 1.1502-6(a).

Generally, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having also been given or executed by each such subsidiary. Id. Thus, generally the common parent is the proper party to sign consents, including Forms 872, for all members of the group. Id.

An agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year is applicable to each corporation which was a member of the group during any part of such taxable year, and to each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under the provisions of § 1.1502-75. Treas. Reg. § 1.1502-77(c).

Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Id.; Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

If for any reason the common parent corporation's existence is about to terminate, the regulations require that it notify the district director with whom the consolidated return is filed of such fact and designate, subject to the approval of such district director, another member to act as agent in its place to the same extent and subject to the same conditions and limitations as are applicable to the common parent. Treas. Reg. § 1.1502-77(d).

If the notice thus required is not given by the common parent, or the designation is not approved by the district director, the remaining members may, subject to the approval of

such district director, designate another member to act as such agent, and notice of such designation shall be given to such district director. Id. Until a notice in writing designating a new agent has been approved by such district director, any notice of deficiency or other communication mailed to the common parent shall be considered as having been properly mailed to the agent of the group; or, if such district director has reason to believe that the existence of the common parent has terminated, he may, if he deems it advisable, deal directly with any member in respect of its liability. Id.

Temp. Reg. § 1.1502-77T, promulgated in 1988 to supplement Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a). In general, where a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. § 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group, but only for purposes of mailing notices of deficiency and for executing waivers of the statute of limitations.

Under Temp. Reg. § 1.1502-77T(a)(4), any one or more of the following corporations may act as "alternative agents" for the group:

> (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
>
> (ii) A successor to the former common parent in a transaction to which § 381(a) applies,
>
> (iii) The agent designated by the group under § 1.1502-77(d), or
>
> (iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

With regards to Temp. Reg. § 1.1502-77T(a)(4)(ii) above, I.R.C. § 381 provides in relevant part that in a transfer of assets to which I.R.C. § 361 applies, and which is in connection with a reorganization described in I.R.C. § 368(a)(1)(A), the acquiring corporation succeeds to and takes account into the items of the transferor corporation described in I.R.C. § 381(c).

Section 361(a) provides that no gain or loss shall be recognized to a corporation if such corporation is a party to a reorganization and exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

Section 368 defines what constitutes a reorganization within the meaning of section 361. Section 368(a)(1)(A) provides that the term "reorganization" means "a statutory merger or consolidation".

In the case at hand, the facts suggest a valid I.R.C. § 368(a)(1)(A) statutory merger under Indiana law, in which the assets and obligations of [redacted] were transferred to or merged into [redacted], and the outstanding stock certificates of [redacted] became shares in the surviving corporation [redacted]. Section 361 would apply to this merger, and consequently, I.R.C. § 381 would also apply to the transaction. Therefore, [redacted] was a successor to the former common parent [redacted] in a transaction to which I.R.C. § 381(a) applies, and [redacted] should qualify to act as an alternative agent for the [redacted] group pursuant to Temp. Reg. § 1.1502-77T(a)(4)(ii).

In addition, since [redacted] was a successor to [redacted] under state law, it succeeded to the consolidated tax liability of [redacted], and is liable under state law for this liability. Therefore, in addition to being an alternative agent for the [redacted] group, [redacted] is a successor to [redacted]'s tax liability under state law. This is an additional reason for obtaining the Form 872 from [redacted].

RECOMMENDATION

In conclusion, [redacted] is the proper party to sign the Form 872 for [redacted] consolidated group for the tax years at issue.

The Form 872 should be captioned as follows:

[redacted],
(EIN: XX) (formerly known as [redacted]
[redacted] and
[redacted]) successor in interest to [redacted]
[redacted] (EIN: [redacted])
and alternative agent for the group*

We recommend that on the front of the Form 872 the asterisk should refer to the following:

*This is with respect to the consolidated tax liability of [redacted]
(EIN: [redacted])
consolidated group for tax years ended [redacted], and short tax year ended [redacted].

The signature block on the Form 872 should read as follows:

[redacted]
(EIN: XX).

The signature block should be signed by a current officer of [redacted].

Please make sure that [redacted] is still in existence at the time the Form 872 is procured.

Under I.R.C. § 6501(c)(4)(B), the Service should advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. You should advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement.

In addition, at the bottom of the Form 872, include the following statement: "In executing this Form 872, taxpayer acknowledges that it has been advised by Exam of its right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame, pursuant to I.R.C. § 6501(c)(4)(B)."

CONCLUSION

We recommend the Form 872 as described above.

When presenting the Forms 872 for execution, please advise the taxpayer of their right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame, pursuant to I.R.C. § 6501(c)(4)(B).[3]

If you have any questions, please contact Jenny A. Moon at 949-360-3431.

Attachments: Exhibits A through J, as stated.

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[3] Request the extensions by letter using Letter 907(DO)(Rev. 2-2000), Letter 907(SC)(Rev. 12-1999), or Letter 967 (Rev. 12-1999) (note that these are revised versions); and furnish the taxpayer or representative with a copy of any of these specific revisions of Publication 1035: Rev. 12-1999, Rev. 8-1996, or Rev. 8-1987.